HUSTINGS COURT OF PETERSBURG.

COMMONWEALTH *v.* WORRELL.

1. Bribery—Section 3745, Code 1904, Not Applicable to Police Officers.—A policeman who had accepted a pecuniary gift in return for a promise not to interfere with the unlawful storage and sale of ardent spirits by a certain person, was indicted for that form of bribery described in § 3745 of the Code of 1904, which makes it an offense "for any executive, legislative or judicial officer to accept * * * any gift or gratuity * * * under an agreement or with an understanding that his vote, opinion or judgment shall be given on any particular side of any question, cause or proceeding which is or may by law be brought before him in his official capacity.". A demurrer to the indictment was sustained, and it was held that the language of § 3745, unlike that of § 3744, applies only to those officers who, acting in a judicial capacity, must render a decision or give an opinion in some cause brought before them, and does not include police officers whose sole duty is to act on matters brought to their attention.

2. Words and Phrases—"Judgment"—"Opinion."—"Judgment" is the result of mental process acting on prior events—the decision of the Court upon the case before it. It is a judicial act, being what is considered or ordered by the Court—the result of the opinion or reason of the Court for its final action. "Opinion" is the reason given by the court for its decision or judgment—the formal expression of the legal reasons or principles upon which the decision is based.

3. Statutes—Interpretation—Words in Common Use.—In the interpretation of statutes words in common use are to be construed in their natural, plain and ordinary signification.

4. Indictments—Felony and Misdemeanor—Conviction of Misdemeanor or Indictment for Felony.—At common law, a count for misdemeanor could not be joined in the same indictment with a count for felony. Nor could a party indicted for felony be convicted on that indictment of a misdemeanor. The two offenses were of different grades, required different modes of trial, and were followed by different judgments. This rule has been modified; as, where one indicted for felony is convicted of part of the offense charged, he shall be sentenced for such part he is so convicted, if the same be substantially charged in the indictment, whether it be felony or misdemeanor; one indicted for felony, may be convicted of an attempt to commit such felony; and one prosecuted for grand larceny, may be found guilty of petit larceny.

Upon his arraignment at the December term, 1919, of the Hustings Court of the City of Petersburg, upon an indictment

for felony, the defendant demurred thereto and moved to quash the same.

The Court sustained the demurrer, holding that the allegations of the indictment did not make out a case as that Sec. 3745 of the Code, under which the indictment was framed, did not apply to a police officer in the matters charged. It did intimate, however, that if these charges were true, it was a case of bribery at common law, and for which the accused could be prosecuted upon proper proceedings had.

Bernard C. Syme, of Petersburg, for the Commonwealth.

Gilliam and *Gilliam,* and *J. R. Barbour,* all of Petersburg, for the defendant.

OPINION.

J. M. MULLEN, JUDGE. The indictment charged that, at the time of the committing of the alleged offense, the accused was a duly qualified and acting police officer of the City of Petersburg, and as such, he had knowledge that one Wilson was engaged in the unlawful storing and sale of ardent spirits, in said city, and intended to continue therein; and, to use the language of the indictment:

"That there was then and there brought by law before the said C. E. Worrell, in his official capacity as said policeman and police officer aforesaid, the question, cause and proceeding as to whether or not he would use his best endeavors to prevent the said W. W. Wilson from unlawfully storing and selling ardent spirits as aforesaid in the said city and detect and arrest him for such unlawful storing and sale, and that the said C. E. Worrell, on the day and year aforesaid, in the city and state aforesaid, and within the jurisdiction of said Court, and while he was such policeman and police officer, as aforesaid, did unlawfully, feloniously and corruptly accept from the said W. W. Wilson, a certain gift and gratuity, to-wit: (naming the same), of the value of eight hundred dollars, the currency of the United States, under an agreement and with an understanding that his vote, opinion and judgment would be given on the side of the question, cause and proceeding aforesaid, so as not to prevent the said W. W. Wilson from unlawfully storing and selling ardent spirits, as aforesaid, in the said city, and so as not to detect and arrest him for such unlawful storing and sale of ardent spirits as aforesaid, against the peace and dignity of the Commonwealth of Virginia."

[1] It will be seen this indictment follows the language of Sec. 3745 of the Code, and which, along with Sec. 3744, against offering a bribe, was enacted at the Session of 1902-3-4, p. 823. These statutes both for offering and accepting bribes, were,

substantially in their present form, first enacted at the Session of 1847-8, C—120: and are found, without substantial change, in the Codes of 1849, 1860, 1873 and 1887—in all of which they are made misdemeanors, punishable with fine and imprisonment in jail. The act of 1902-3-4, and for the first time, made them felonies, punishable with confinement in the penitentiary.

In Sec. 3744, the offense is for "any person to give, offer or promise * * *, any gift or gratuity to any executive, legislative or judicial officer, * * * with intent to influence his act, vote, opinion, decision, or judgment in any matter, question, cause or proceeding, which is or may be then pending, or may by law come or be brought before him in his official capacity."

In Sec. 3745, the offense is "for any executive, legislative or judicial officer to accept * * * any gift or gratuity * * * under an agreement or with an understanding that his vote, opinion or judgment shall be given on any particular side of any question, cause or proceeding which is or may by law be brought before him in his official capacity."

None of the provisions of Sec. 3745, have been passed upon by the Appellate Court; but, in Haynes Case, 104 Va., 854, it was held that a police officer was such an officer as was contemplated by Sec. 3744, he being an executive officer; and it further holds that, although his functions are largely ministerial, public officer whose duties are ministerial, is included under the head of "Executive" officers.

It will be noticed that the word "act" and also the word "matter" appearing in Sec. 3744, are omitted from Sec. 3745. And it will also be noticed that the words "on any particular side of," are found in Section 3745, but not in Sec. 3744.

As a rule, police officers only "act" in "matters" brought before them, especially in arresting criminals, but they never give an "opinion" or render "judgment" upon "a particlar side of any question, cause or proceeding." This is a judicial function and not executive or ministerial, so when the Statute in speaking of an officer "acceptin " bribes, under an agreement that "his * * * opinion or judgment shall be given * * * upon a particular side of any question, cause or proceeding," it can refer only to the decision of some officer acting in a judicial capacity upon some cause or proceeding properly brought before him for his opinion and judgment. There must be something between parties—a controversy, in which there are two or more sides—for him to pass upon and adjudicate.

[2] "Judgment" is the result of mental process acting on prior events—the decision of the Court upon the case before it. It is a judicial act being what is considered or ordered by the Court; while

"Opinion" is the reason given by the Court for its decision, or judgment. "Judgment" is the result of the opinion or reason of the Court for its final action. "Opinion" as Webster defines it, is (in law) the formal expression by a Judge, Court, Referee, or the like, of the legal reasons or principles upon which the decision is based; and "judgment" the act of determining what is conformable to law and justice.

It follows, therefore, that the giving of an "opinion" and the rendering of a "judgment on any particular side of a question, cause or proceeding" is the act of one exercising judicial functions in determining controversies—the rights of parties on disputed questions.

When we consider the difference in the phraseology of these two sections, and the omission of certain words, "matter" and "act" used in Sec. 3744, but omitted from Sec. 3745, and the expression "on any particular side" found in Sec. 3745, but not in Sec. 3744, the conclusion is irresistible that Sec. 3745 has in contemplation one acting judicially and not ministerially. Police officers "act" in "matters" brought before them, but give no "opinion" and render no "judgment," in any cause or proceeding.

In apprehending and arresting violators of the criminal law, a police officer must "act" not "question"—he must arrest and not give an "opinion" or render a "judgment." In such "matters," a police officer is not within the contemplation of Sec. 3745.

The other word in connection with and preceding the words "opinion and judgment" used in Sec. 3745, is "vote." It is conceded police officers do not "vote" upon any "matters" upon which they are called to act. To "vote" is a legislative act, or the act of the citizen in exercising the elective franchise. To "vote," says Webster, "is to express or signify the mind, will or preference, either *'viva voce'* or by ballot, to cast or give a vote."

[3] In the interpretation of statutes, words in common use are to be construed in their natural, plain and ordinary signification—Willis *v.* Kalmbach, 109 Va. 475.

It was urged upon the Court that the accused could be tried under this indictment for common law bribery. The Court thought otherwise, and for three reasons: First, It charged no offense; second, It charged a felony, whereas bribery at common law is a misdemeanor; and, third, The Police Court and not the Hustings Court, had original jurisdiction, and notwithstanding the dismissal of this indictment, in the Hustings Court, the accused can be proceeded against in the police court.

which has original jurisdiction of the common law offense of bribery.

If it be conceded that the indictment could be treated as an indictment for bribery at common law, such a ruling would have made it an indictment for a misdemeanor, and the word "feloniously" as surplusage rejected. But such a ruling would have required the Court to remand the indictment in the Police Court for trial—Code 1904, Sec. 4106.

The Court would have taken this course had it not been fully satisfied the indictment charged no offense. If, however, the Court erred in not remanding, the Commonwealth is put at no disadvantage, as it can proceed in the Police Court by warrant and without an indictment.

[4] At common law, a count for misdemeanor could not be joined in the same indictment with a count for felony. Nor could a party indicted for felony be convicted on that indictment of a misdemeanor. The two offenses were of different grades, required different modes of trial, and were followed by different judgments. *Hardy's Case,* 17 Gratt. 592 (594). It is true this rule has been modified; as, where one indicted for felony is convicted of part of the offense charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor—Code 1904, Sec. 4040. Again, one indicted for felony, may be convicted of an attempt to commit such felony—Code 1904, Sec. 4045. Also, one prosecuted for grand larceny, may be found guilty of petit larceny—Code 1904, Sec. 4043—see also Sec. 4042.

But neither of these statutory modifications of the common law rule have any application to this indictment.